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In The

Supreme Court of the United States

OCTOBER TERM 1961

No. ~~1018~~ 188

BENSON M. LARRICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1. The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.[1]

[1]The Joint Appendix is hereinafter cited as "App. p. .....". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. ..... p. .....", together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz., "Exh. BZ", those of defendants by the name of defendant and arabic number, viz., "Larrick Exh. 1", in accordance with the designation at the trial.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1962 (App. p. 114). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). Time for filing of petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1254, and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether the existence of, and knowledge with a purpose to further, a single conspiracy with multiple objectives may be permitted as a matter of law to be found as against petitioner solely from his participation in some, but not all, of the conspiracies' major objectives, where the success of any one objective was not dependent upon the success of any other.

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was not supported by any evidence.

STATEMENT

This petitioner adopts and incorporates herein by reference the Statement of the Case made by petitioners Fred Isaacs and Harry Isaacs, who have likewise filed a petition for certiorari to review the judgment of the Court of Appeals for the Eighth Circuit. To complete such Statement, it must be added that this petitioner duly objected to the submission of the alleged overall scheme and conspiracy to defraud by Motions, made both at the conclusion of the Government's case and at the close of all the evidence, to strike as to him all evidence other than that relating to scrap (V. 41, pp. 61, 79, 80, 83, 85, 87; V. 42, pp. 131, 132; V. 44, pp. 1-3; V. 45,

p. 27; V. 61, pp. 41, 42, 57), to sever and grant this petitioner a separate trial as to the scrap transaction (V. 45, pp. 26, 27) and for judgment of acquittal, all of which were overruled, and duly excepted (V. 70, p. 1) to the trial court's instruction to the jury submitting the overall scheme as to him. Petitioner also sufficiently reserved objection to the instructions given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instruction requested withdrawing from the jury the issue of fraud in the passage of the ordinance (petitioner Isaacs' requested instruction No. 16 joined in by this petitioner, V. 63, p. 28, and, as to the exception to the court's refusal to so charge, see V. 70, pp. 4, 5, 12) as the court below concluded (App. p. 47).

Petitioner was found guilty on six counts of mail fraud, (Counts I, II, III, V, VI and VII), two counts of wire fraud (Counts VIII and IX), three counts of interstate shipment of goods allegedly obtained by fraud (Counts XIV, XV and XVI) and conspiracy to commit these offenses (Count XVII). After Motions for Judgment of Acquittal or a New Trial were overruled (App. pp. 81, 86), petitioner was sentenced to imprisonment for two years and to pay a fine in the sum of $1,000 (a committed fine) as punishment for the offenses set forth in Counts I, II, III, V, VI, VII, VIII and IX, the sentence and fine to be a general sentence; and was sentenced to imprisonment for two years and to pay a fine in the sum of $2,000.00 (a committed fine) as punishment for the offenses set forth in Counts XIV, XV, XVI and XVII, the sentence and fine to be a general sentence, the penal sentence to be concurrent and not consecutive with

that imposed with respect to Counts I, II, III, V, VI, VII, VIII and IX (V. 72, pp. 52, 53).[2]

REASONS FOR GRANTING THE WRIT

1. The court below decided a question which is important because of its impact upon the scope of conspiracy prosecutions.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Company v. United States*, *supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States*, 328 U.S. 750 (1946); *Blumenthal v. United States*, 332 U.S. 539 (1947). These decisions would indicate, if they do not explicitly hold, that even the existence of such a single conspiracy may not be inferred solely from a series of transactions, no one of which is dependent for its success upon any other.

In *Blumenthal*, this Court affirmed convictions of a single conspiracy where each transaction was a stage in a chain of distribution, each of which was dependent for its success on all other stages of distribution, the participation in any part affording a basis for a finding of knowledge and a purpose to further the larger plan.

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[2]Prior to its charge to the jury, the trial court dismissed certain counts in No. 4-59-Cr 77, Count X, alleging a mailing relating to the transfer of certain real estate, and Count XIII relating to the Villaume transaction, as well as Counts IV and XI relating to the Midcontinent transaction. The jury found petitioner not guilty on Count XII, which alleged a mailing relating to the Villaume transaction.

On the other hand, in *Kotteakos*, this Court reversed conspiracy convictions of several defendants, each of whom dealt with a central figure in order to attain his own illegal end. There, as this Court later explained in *Blumenthal*, "* * * no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end * * *" (332 U.S. at page 558).

In *Ingram*, this Court held that where a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan, renewing a prior warning that "* * * evidence of knowledge must be clear, not equivocal * * *" because "* * * charges of conspiracy are not to be made out by piling inference upon inference * * *" (360 U.S. at page 680, quoting from *Direct Sales Company v. United States*, *supra*, at p. 703).

This case presents the important question not presented in *Ingram* or *Kotteakos*, whether knowledge and the purpose to further such a conspiracy may be inferred as against one who participated in some, but not all, of the transactions embraced in the one proceeding, where no one of the transactions in suit were dependent for their success upon any other, and guilt, if any, must be inferred solely from conduct with respect to some of the transactions.

None of the various transactions tried in this proceeding, scrap transfers, real estate sales, commission payments, Mexican Note commissions, or any other claimed illegal transaction, was dependent upon any other for its success. Yet, the trial court submitted the evidence as to all of these transactions against petitioner, including those in which he

did not participate (V. 69, pp. 32, 33, 44, 47, 49, 51, 53, 85, 93, 94, 104-111).

The trial of petitioner in such a proceeding violated the principle, if not the precise holding, of *Ingram* and *Kotteakos*, because there was no sufficient nexus between the several transactions and the trial of all the transactions in one proceeding presents the grave danger of "* * * transference of guilt from one (defendant) to another * * *." *Kotteakos v. United States*, *supra*, at page 774; *Schaffer v. United States*, 362 U.S. 511, 522-4, (per Douglas, J. dissenting, 1960).

The petitioner was plainly prejudiced. There was admittedly no evidence that petitioner profited financially from any of the transactions in suit, as the trial court instructed (V. 69, p. 111). Yet the jury was permitted to weigh against him that in the Hopkins right-of-way transaction, in which he did not participate (as the trial court instructed, V. 69, p. 105), a fellow officer and co-defendant received a profit, directly or indirectly, of $52,000.00 (V. 36, pp. 54-71, Exh. N-D-1). The jury was also permitted to weigh against petitioner evidence as to two commissions paid to Jeffords with which petitioner had no connection (admittedly an administrative assistant stamped his name on voucher authorizing payment as a matter of routine, without his knowledge (V. 38, pp. 131, 134-5, Exh. C-O) and which were handled by Jeffords in a manner to suggest a kick-back to some officer of the Transit Company (App. p. 84).

The evidence of Larrick's participation in other transactions, although we assume it to be sufficient for the purpose of this petition, was tenuous at best and was necessarily weighed by the jury in the light of evidence concerning other transactions, including those with which petitioner had no connection. Even the court below treated as significant that

petitioner joined in a Board resolution ratifying the sale of two lots from which Towey benefited, although on its face the resolution purported to authorize the sale to one Bernard Heintz and did not disclose his relation to Towey (Exh. C-X, V. 44, p. 148). With respect to the last, and largest, commission paid to Jeffords, the principal evidence of fraud (the minutes of an Executive Committee meeting of April 12, 1954, purporting to authorize an exclusive listing to Jeffords, which were claimed by the Government to have been fabricated, Exh. C-R, V. 38, pp. 111-3) was apparently not called to petitioner's attention until after the commission was paid to Jeffords (V. 38, pp. 139, 142-3). Even in the case of transactions as to which petitioner's connection was clear, the issue of fraud was necessarily adjudged by the jury in the light of evidence as to all the transactions in suit.

We recognize, of course, that where the transactions in which the accused participated are dependent for their success on that of others embraced in a larger plan of necessarily imprecise scope, the accused cannot complain that he was unaware of all the "details" of the larger plan (*Blumenthal*, at pp. 558-9). But where, as here, there is no interdependence upon any other transactions in suit, there is no basis for a finding that the accused had knowledge of any larger plan or any purpose to further it and hence no justification for subjecting him to the risk of "transference of guilt" from one (defendant) to another (*Kotteakos*, at p. 774).

The court below, we respectfully submit, has thus attempted to "broaden" the already pervasive and wide sweeping net of conspiracy prosecutions, *Grunewald v. United States*, 353 U.S. 391, 404 (1957), in disregard of warnings "repeatedly" given by this Court and the "important considerations of policy behind such warnings" (*id.* p. 404).

2. As to the second question presented, whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was not supported by any evidence, this petitioner adopts and incorporates herein the reasons for granting the Writ contained in the petition of Fred Isaacs and Harry Isaacs, from which this petitioner earlier herein adopted the Statement of the Case.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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